

ORIGINAL

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CLERK, U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re : LIVE CONCERT ANTITRUST
 LITIGATION

2:06-ML-01745 SVW (RC x)

This document relates to:
 ALL ACTIONS

**POSITION STATEMENT OF
 PLAINTIFFS REGARDING
 THE PARTIES' PROPOSALS
 ON METHODS TO NARROW
 THE SCOPE OF CLASS
 DISCOVERY**

In anticipation of the October 23, 2006 status conference, Plaintiffs submit the following Position Statement regarding the two proposals that the parties will submit to the Court on how discovery and class certification should proceed. In short, while both Plaintiffs and Defendants recognize that the parties should develop a way to narrow the discovery process and the class certification briefing in the interests of judicial economy, they disagree on the manner in which this common goal should be accomplished. Plaintiffs have filed twenty-two (22) complaints, each alleging a separate geographic market limited to the region in which each complaint was originally filed. Plaintiffs therefore recommend that this Court initially limit class certification to five sample or template regional markets. On the other hand, Defendants believe that the Court should initially limit discovery to discovery

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1 related to the definition of the relevant product market and thereafter hear
 2 Defendants' dispositive motion (presumably a motion for summary judgment) on
 3 that issue alone before proceeding with class certification. Plaintiffs' proposal
 4 allows the parties to explore all class discovery and class certification-related issues
 5 (including the definition of product market) within limited test markets while
 6 ensuring that fundamental fairness inures to both parties through their ability to
 7 present *all* class-related issues to the Court. Defendants' position, on the other hand,
 8 catapults the parties into summary judgment proceedings on one issue alone before
 9 Plaintiffs have had the benefit of full merits discovery.

10 **I. Plaintiffs' Proposal To Proceed In Sample Markets For Discovery And**
 11 **Class Certification Serves The Interest of Judicial Efficiency While**
 12 **Ensuring Fundamental Fairness to all Parties**

13 Plaintiffs propose that, at the initial stages of this case, discovery be limited to
 14 the five regional markets of Boston, Chicago, Denver, Los Angeles, and New
 15 Jersey/New York, as well as discovery at the corporate-level that relates to all
 16 markets, and that Plaintiffs initially file motions for class certification related to
 17 these test markets. Plaintiffs believe that the identification of five regions, or
 18 sample markets, will provide efficiencies for the parties as well as the Court.

19 Plaintiffs' proposal has several advantages. Unlike Defendants' proposal, it
 20 permits the full litigation of all factors under Fed. R. Civ. P. 23, but limits the
 21 number of markets in which this Court will have to do that analysis (and in which
 22 the parties will conduct discovery). If adopted, the parties would postpone litigating
 23 the non-test markets until the outcome of class certification on the test markets.¹
 24 Since the class certification issues for each region will share many common issues,
 25 the sample market approach proposed by Plaintiffs will narrow the contested issues
 26

27 ¹ Plaintiffs have made this proposal to Defendants. Defendants have not rejected it outright.
 28 Rather, Defendants advised that they would consider it if this Court rejects their request to limit
 the initial issue to the definition of product market.

1 in many other geographic regions and greatly reduce the resources to be dedicated to
2 class certification by the Court and the parties.

3 Moreover, this approach could motivate the parties to discuss a potential
4 resolution of all 22 cases after class certification on the five test or sample markets
5 has been decided. At the very least, it could serve as a basis for a stipulation on
6 certification of classes for the balance of the geographic markets. Indeed, the
7 sample market approach is akin to bellwether trials used in the mass tort context
8 where courts faced with thousands of cases identify certain representative cases for
9 trial. Bellwether trials are designed to allow the parties to ascertain value for
10 settlement purposes and/or to answer common causation or liability questions.

11 **II. Summary Adjudication Of Issues Prior To Class Certification Is** 12 **Premature**

13 Defendants propose a discovery schedule calling for an initial determination
14 of the issues relating to the product market. As Plaintiffs understand the
15 Defendants' proposition, Defendants are essentially asking the Court to focus
16 discovery on one issue and determine whether summary judgment is appropriate as
17 to that issue prior to class certification and prior to general merits discovery. Such a
18 schedule would unduly delay class certification contrary to the intent of Fed. R. Civ.
19 P. 23(c)(1)(A) and would be generally premature and wasteful under the rule.

20 A. Class certification should not be unduly delayed by Defendants' 21 proposed schedule

22 An attempt to obtain a preliminary judgment on one individual issue in the
23 absence of merits discovery and before class certification is decided is not justified
24 under Fed. R. Civ. P. 23. It is likely that the Defendants will argue that the Court
25 can determine the merits of Plaintiffs' product market prior to class certification, on
26 a motion for summary judgment, in part, because of the recent change to Rule
27 23(c)(1)(A), which gives the Court wider discretion to decide the timing of its class
28 certification decision. Nevertheless, the Advisory Committee Notes to the amended
Rule 23 are clear that "[a]lthough many circumstances may justify deferring the

1 certification decision, active management may be necessary to ensure that the
 2 certification decision is not unjustifiably delayed.” Fed. R. Civ. P. 23, Advisory
 3 Committee Note. It is undeniable that limiting discovery to one issue, prior to
 4 discovery on class certification issues, would significantly delay the class
 5 certification process. Defendants’ proposal that the parties conduct discovery as to
 6 product market alone, fully brief that issue to the Court, and only proceed to full
 7 discovery after the Court has ruled on that issue would unreasonably delay class
 8 certification by months, if not more than a year.

9 Additionally, the Advisory Notes to Rule 23 encourage Courts to guard
 10 against “forcing an artificial and ultimately wasteful division between ‘certification
 11 discovery’ and ‘merits discovery.’” Fed. R. Civ. P. 23, Advisory Committee Note.
 12 Defendants propose an even more wasteful division by requesting that the Court
 13 require the parties to conduct a lengthy inquiry into one single issue, which the
 14 Defendants alone have determined to be of preliminary importance. This is clearly
 15 contrary to Fed. R. Civ. P. 23(c)(1)(A).

16 *B. Defendants propose a premature and wasteful inquiry into the merits*

17 Generally, an evaluation of the probable outcome on the merits is not properly
 18 part of the certification decision. Fed. R. Civ. P. 23, Advisory Committee Note. A
 19 motion for class certification should ordinarily be determined prior to the
 20 adjudication of a dispositive motion. *See Schwarzschild v. Tse*, 69 F.3d 293, 292
 21 (9th Cir. 1995) (“district courts generally do not grant summary judgment on the
 22 merits of a class action until the class has been properly certified and notified”);
 23 *Wright v. Schock*, 742 F.2d 541-44 (9th Cir. 1984) (same). There is “nothing in
 24 either the language or history of Rule 23 that gives a court any authority to conduct
 25 a preliminary inquiry into the merits of a suit in order to determine whether it may
 26 be maintained as a class action.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177
 27 (1974). As such, unless the circumstances justify it, a court should not inquire into
 28 the merits of a case before class certification. It has been held that courts “could

1 probably delay even the initial class certification until after a summary judgment,
 2 but it would be inadvisable.” *Irwin v. Mascott*, 2001 U.S. Dist. LEXIS 3285 (N.D.
 3 Cal. February 27, 2001). As a general rule, district courts are urged to exercise
 4 caution in delaying class certification until after summary judgment. *Id.*

5 While a determination of the merits prior to class certification may be a
 6 possibility under certain circumstances, that deviation from the general practice is
 7 not justified here. In every case that is filed there are dispositive issues that will
 8 eventually need to be weighed by the court. The mere existence of a possibly
 9 dispositive defense² should not entitle the Defendants to dispense with the
 10 customary discovery and motion practice procedures of the court. To conduct an
 11 initial wave of discovery focused on a single issue, or even two of three individual
 12 issues, will require the parties to conduct duplicative discovery should the
 13 Defendants’ motion be denied. The Defendants ask that the Court create a
 14 specialized discovery process, based solely on the gamble that their product market
 15 arguments will be accepted by the Court. While Defendants’ arguments relating to
 16 product market will be heard, the progress and development of the case as a whole
 17 should not be sacrificed to prematurely do so.

18 **III. Revision of [Proposed] Discovery Plan**

19 Plaintiffs previously filed with the Court their Unopposed Motion For Entry
 20 of Case Management Order No. 1 An To Appoint Interim Class Co-lead Counsel.
 21 Attached to that motion, Plaintiffs provided a [Proposed] Discovery Plan, suggesting
 22 a schedule for the completion of the various stages of discovery and pre-trial motion
 23 practice. Due to various filing and scheduling issues, the Discovery Plan originally
 24 suggested to the Court is no longer an accurate reflection of the current status of the
 25 case, nor does it set realistic deadlines given that status. Plaintiffs have revised this

26
 27 ² Notably, while Defendants posit that the definition of product market will be dispositive, it was
 28 not dispositive in *Nobody In Particular Presents Inc. v. Clear Channel Communcs., Inc.*, 311 F.
 Supp. 2d 1048 (D. Colo. 2004), a case involving issues similar to the ones alleged in the regional
 complaints here.

1 schedule by pushing all of the deadline dates back by 60 days. Plaintiffs posit that
2 the revisions contained in the amended Discovery Plan, attached hereto as Exhibit
3 A, set realistic dates for the progression of this case.

4 **IV. Conclusion**

5 Plaintiffs respectfully request that, to reduce the Court's burden on hearing
6 Plaintiffs' motions for class certification, the Court designate five markets, or
7 regional classes, for discovery, briefing and decision on motions for class
8 certification.

9 Respectfully submitted,

10 Dated: October 17, 2006

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EXHIBIT – A

DISCOVERY PLAN – MDL 1745

ORIGINAL PROPOSED DATE	ACTUAL DATE OR PROPOSED NEW DATE	EVENT
Monday, June 5, 2006	CMO not entered at last date. Anticipated entry date: October 23, 2006	Status Conference before Judge Wilson. Parties to submit agreed case management order, or competing orders, by May 30, 2006, to be served in each case by electronic mail to each other and overnight mail or hand delivery to the Court.
Monday, June 5, 2006	Protective Order submitted to Court on or about September 22, 2006	Parties waive requirements of Fed. R. Civ. P. Rule 16; in lieu thereof, parties will jointly submit this agreed schedule for the Court's approval. Also by this date, the parties should have begun to negotiate a mutually satisfactory protective order.
Friday, July 7, 2006	Proposed new date (based on Judge Wilson's statements at least hearing that 26(a) disclosures to be made before he approves a discovery plan and discovery commences: October 23, 2006	As of this date, the parties may propound initial document requests and interrogatories in conformity with the Fed. R. Civ. P. and Local Rules. The parties may likewise commence third party discovery, on the condition that simultaneous notice of subpoenas is provided by the parties.
Friday, July 7, 2006	Actual: August 30, 2006	Amended complaints in any of the transferred actions shall be filed on or before this date.
Monday, August 21, 2006	Actual: September 25, 2006	Parties to exchange initial disclosures under Fed. R. Civ. P. 26(a)(1).
Thursday, January 11, 2007	New Proposed: March 12, 2007	Deadline for service of document requests and interrogatories.

ORIGINAL PROPOSED DATE	ACTUAL DATE OR PROPOSED NEW DATE	EVENT
Monday, January 15, 2007	New Proposed: April 6, 2007	Last date for plaintiffs to file (a) Class Certification expert reports and (b) Motions for Class Certification.
Wednesday, April 4, 2007	New Proposed: June 6, 2007	Last date for defendants to file (a) Class Certification expert reports and (b) Oppositions to Motions for Class Certification.
Monday, May 7, 2007	New Proposed: July 10, 2007	Last date for plaintiffs to file (a) any rebuttal expert reports and (b) Class Certification reply briefs.
To be scheduled	To be scheduled at earliest convenience of Court	Hearing on Motions for Class Certification (subject to Court's calendar) at the earliest convenience of the Court.
Tuesday, July 31, 2007	New Proposed: September 28, 2007	Fact discovery closes.
Tuesday, July 31, 2007	New Proposed: September 28, 2007	Plaintiffs' motions to remand coordinated actions under <u>Lexecon</u> shall not be filed before this date.
Wednesday, October 3, 2007	New Proposed: October 3, 2007	Plaintiffs to serve expert reports.
Monday, November 19, 2007	New Proposed: November 3, 2007	Defendants to serve expert reports.

ORIGINAL PROPOSED DATE	ACTUAL DATE OR PROPOSED NEW DATE	EVENT
Wednesday, December 19, 2007	New Proposed: Expert depositions can begin immediately after service of expert reports, but in any event Plaintiffs' expert deposed first, Defendants' expert deposed second and depositions of experts to be completed by December 31, 2007.	Expert depositions may begin.
Friday, January 18, 2008	New Proposed: December 15, 2007	Plaintiffs to serve any rebuttal expert reports.
Friday, January 25, 2008	New Proposed: December 31, 2007	Expert discovery closes.
Friday, February 22, 2008	New Proposed: January 30, 2008	Last date for filing dispositive motions.
Friday, March 28, 2008	New Proposed: February 28, 2008	Last date for oppositions to dispositive motions.
Friday, April 25, 2008	New Proposed: March 15, 2008	Last date for dispositive motions reply briefs.
May 2008	Same Proposed: May 2008	Hearing on dispositive motions (subject to the Court's calendar).
Friday, June 13, 2008	Same Proposed: June 13, 2008	Last day for filing motions in limine and other non-dispositive pretrial motions.
Friday, June 27, 2008	Same Proposed: June 27, 2008	Parties must exchange proposed exhibit lists, witness lists, and jury instructions.

ORIGINAL PROPOSED DATE	ACTUAL DATE OR PROPOSED NEW DATE	EVENT
Wednesday, July 9, 2008	Same Proposed: July 9, 2008	Last date to meet and confer re: pretrial order. Last date for filing oppositions to motions in limine.
Wednesday, July 23, 2008	Same Proposed: July 23, 2008	Last date for filing pretrial order, agreed set of jury instructions and verdict forms, and filing setting forth status of disputed instructions, verdict forms, etc. Last date for filing motion in limine reply briefs.
Week of August 4, 2008	Same Proposed: Week of August 4, 2008	Subject to the Court's calendar, pretrial conference and hearing on motions in limine. Parties to exchange demonstrable exhibits.
Monday, August 11, 2008	Same Proposed: August 11, 2008	Trial begins.

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 700 South Flower Street, Suite 2940, Los Angeles, California 90017-4101.

On October 17, 2006, I served the foregoing document(s) described as

**POSITION STATEMENT OF PLAINTIFFS REGARDING THE PARTIES' PROPOSALS
ON METHODS TO NARROW THE SCOPE OF CLASS DISCOVERY**

on all interested parties in this action as follows:

[X] BY MAIL

By placing a true copy thereof enclosed in sealed envelopes address as follows: **See Attached Service List.** That there is a regular communication by mail between the place of mailing and the places so addressed. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

[X] BY E-MAIL

By causing the above listed document to be served by E-MAIL from Jennye Mouser to the e-mail addresses as follows: **See attached Service List.**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 17, 2006 at Los Angeles, California.


JENNYE F. MOUSER

SERVICE LIST

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MDL: 2:06-ML-01745 SVW (RCx)
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